

Claimant appeared by and through her attorney, Norman I. Cooley of Wichita, Kansas. The respondent, a qualified self insured, appeared by and through its attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund

appeared by and through its attorney, Randall C. Henry of Hutchinson, Kansas. There were no other appearances.

RECORD

The record for purpose of this appeal consists of the documents of record filed with the Division of Workers Compensation in this docketed matter including only the June 16, 1994 preliminary hearing before Administrative Law Judge John D. Clark and the exhibits attached thereto.

ISSUES

- (1) Did claimant suffer injury by accident?
- (2) Did claimant's accidental injury arise out of and in the course of her employment?
- (3) Does the Appeals Board have jurisdiction to decide this matter under K.S.A. 44-534a and/or K.S.A. 44-551?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purpose of preliminary hearing the Appeals Board finds as follows:

The parties stipulated at oral argument the only preliminary hearing from which an appeal has been timely taken is that of June 16, 1994. Attached as exhibits to the preliminary hearing transcript are the medical records of Dr. Eugene Kaufman including his clinical notes of February 10, 1994, his prescription for continued physical therapy, prescription for a referral to Dr. Welch, office notes of May 12, 1994, insurance documentation showing medical bills in the amount of \$237.00, insurance documentation showing claimant's release to work without restriction in one week, and office notes of May 5, 1994.

The only Form E-1 Claim for Compensation and Application for Hearing filed in this matter by the claimant alleges accidental injury on May 29, 1993 to the claimant's neck after having been struck by falling objects. During oral argument, discussion occurred regarding an alleged slip and fall injury to the claimant's shoulder. This incident, after consultation with the attorneys, appears to be a totally separate incident from that alleged on the claimant's E-1. No E-1 alleging injury to claimant's shoulder has been filed in this matter.

K.S.A. 44-534 states as follows:

(a) Whenever the employer, worker or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to the workers compensation benefits due the injured worker thereunder, the employer, worker or insurance carrier may apply in writing to the director for a determination of benefits of compensation due or claimed to be due. The application shall be in the form prescribed by the rules and regulations of the director and shall set forth the substantial and material facts in relation to the claim.

K.S.A. 44-534a(a)(1) states in part:

"After an application for hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employer or employee may make application for a preliminary hearing....

The statute mandates, in a disputed situation, the filing of an application for hearing, i.e., Form E-1 pursuant to K.S.A. 44-534 before an application for preliminary hearing may be filed under K.S.A. 44-534a. Absent this, consideration of the claimant's allegations regarding an injury to her shoulder cannot be conducted. The Appeals Board finds the claimant's failure to file an E-1 relating to the alleged injury to claimant's shoulder, precludes claimant from pursuing benefits under K.S.A. 44-534a.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) finds burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all the various conditions on which her right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Company, 236 Kan. 237, 689 P.2d 871 (1984).

Contained in the medical records of Dr. Kaufman are office notes from February 10, 1994 through May 12, 1994. The February 10, 1994 office note indicated claimant's headaches were gone and her shoulder was doing much better. In the medical records of May 5, 1994 the claimant complained of radicular pain into her head which according to Dr. Kaufman is not related to her shoulder problem.

Even if a claim for the shoulder injury had been properly filed before the Director, the medical evidence in this case fails to substantiate claimant's allegation that her ongoing headaches, for which she seeks medical care, are related to an injury arising out of and in the course of her employment with respondent. The medical evidence in the record fails to substantiate a connection between the alleged injury to claimant's neck on May 29, 1993

and her ongoing headaches. The medical evidence of Dr. Kaufman further fails to substantiate a connection between the radicular pain in claimant's head and her alleged shoulder injury. Claimant has failed to prove a job related connection between the claimant's shoulder and her headaches. Accordingly compensation would also be denied for this reason.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge John D. Clark of June 16, 1994, shall be and herein is reversed and the claimant is denied ongoing medical care for her headaches.

IT IS SO ORDERED.

Dated this ____ day of August, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Norman I. Cooley, 532 N. Market, Wichita, KS 67202
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John D. Clark, Administrative Law Judge

BARBARA BAKER

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DOCKET NO. 180,074

George Gomez, Director